their nature it was prudent and right for him as a trustee to make.

One further matter remains to be mentioned. It was contended in the Appellate Court and before their Lordships' Board, that no appeal lies from the exercise by a trial Judge of the discretion conferred by section 60 of the above-mentioned Ordinance. The Appellate Court rejected this contention. Actually, no discretion had in fact been exercised by the trial Judge in the present case. There was no *decision* to exercise a discretion; there was merely an *obiter dictum* as to the course which he would have pursued if an event had happened which had not happened. The point did not, and does not, in strictness arise. Their Lordships therefore merely state that without further argument they are not prepared to differ from the views of the Appellate Court in the present case, or from the statement of Cozens-Hardy, M.R., in *Re Allsop Whittaker* v. *Bamford*, (1914) 1 Ch., at p. 14, where he said, " It is properly matter of appeal."

In the result, the appeal ought in their Lordships' opinion to succeed as to the loans on the security of jewellery, and to fail as to the loans to Chetties. The Order of the Court of Appeal should be varied by restricting the loans therein mentioned to the loans referred to in paragraph 9 (6) of the statement of claim. Their Lordships will humbly advise His Majesty accordingly.

In regard to costs, since the appellant should have been in a substantial degree successful on the appeal from the judgment of the trial Judge, their Lordships think that he might properly be placed on the same footing as to his costs of that appeal with the appellant on that appeal, who should have been only partially successful therein. Accordingly the order of the Court of Appeal must further be varied by inserting therein after the words " the appellant's costs " the words " and the respondent's costs," and striking out the words therein contained relating to the respondent's costs. There will be no order as to the costs of the appeal to His Majesty in Council.

Appeal allowed in part.

Solicitors for Appellant—*Lattey & Dawe*, London.

Solicitors for Respondents—*Herbert Z. Deane & Co.*, London.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

August 30, 1934.

WEE ENG WAN.....Plaintiff.

v.

J. LAYCOCK & ORS..... Defendants.

[IN FORMA PAUPERIS No. 5 of 1934]

[SINGAPORE SUIT No. 982 of 1933]

Practice—suit by a pauper—dismissal of action—jurisdiction to award costs against a pauper—Civil Procedure Code, S.774.

There is no provision in the Civil Procedure Code, 1907, which confers upon the Court jurisdiction to award costs against a pauper whose suit is dismissed. An order can, however, be made against a pauper for payment of costs incurred before he gave notice of the order admitting him to sue *in forma pauperis*.

Further cosideration of action before Terrell, J. on the 28th August 1934. Question reserved for determination by the Court whether, upon the dismissal of an action brought by a pauper, an order for costs can be made against him.

The arguments sufficiently appear from the Judgment below.

Dr. C. H. Withers Payne for Plaintiff.

Roland Braddell (*Briggs* with him) for Defendants.

Cur. Ad. Vult.

TERRELL, J.—The action having been dismissed the question of costs was reserved for argument before me on August, 28th. The plaintiff sued *in forma pauperis*. The order enabling him so to sue was made on the 24th March, 1934, and notice thereof was given to the defendants' solicitors on the 9th April, 1934. In England the order does not become operative until it has been served on the opposite party but here it is the practice for a formal notice to take the place of actual service of the order.

The plaintiff is entitled under the will of Ho Sok Choo Neo, who died in December, 1931, to a contingent legacy of $5,000 payable 10 years after her death, i.e. in December, 1941. The defendants wish to apply this legacy so far as it will extend, in paying the costs of the action. For this purpose they ask for an order for payment of costs by the pauper coupled with an undertaking that they will not execute the order except by retainer out of the legacy if and when payable.

It was suggested by defendants' counsel that by virtue of section 1270 they might obtain an order to pay the costs out of the plaintiff's share in the trust funds. But this section only applies where the dispute relates to a particular legacy, etc. In this case the legacy was never in dispute at all and the section has no application.

The only question to be decided therefore is whether an order for costs can in any case be made against a pauper. Sections 766-776 inclusive of the Civil Procedure Code are based

on the English Order XVI rules 22 to 31 which were however revised in 1913 and again in 1926. The sections nowhere say that a pauper is not to pay costs, but the implication from section 774—"The Court or a Judge may order costs to be paid to a person admitted to sue or defend as a pauper"—is that the Court has no jurisdiction to order costs to be paid *by* a pauper.

Dr. Withers Payne for the plaintiff submitted that there were only three cases in which a pauper litigant could be ordered to pay costs. They are said to be:—

(*a*) Where there has been a frivolous appeal. The authority for this is the case of *Drummond* v. *Harvey*, 1927 W.N. p.280, where however costs were not awarded and the *dictum* is therefore *obiter*. In *Gordon* v. *Goldstein*, 132 L.T. at p.154 the Master of the Rolls also claimed that the Court of Appeal had jurisdiction to order costs against a pauper but again the discretion, if any, was not exercised. In both these cases the Court claimed that it had discretion by virtue of Order XVI Rule 31E of the 1913 Rules and Orders.

(*b*) Costs of an intervention by the King's Proctor.

It is certainly stated in the current Annual Practice p.278 that a pauper can be ordered to pay the King's Proctor's costs but the case of *Roberts* v. *Roberts*, 1916 Probate, p.187, is hardly an authority. The petitioner in that case obtained a decree *nisi* as a pauper but the ground given for ordering him to pay costs was that there was no order that he should appear in the intervention as a pauper.

In the later case of *Elliott* v. *Elliott*, 37 T.L.R. p. 834 the costs of the King's Proctor were allowed against the pauper petitioner by virtue of the discretion given to the Court by Order XVI Rule 31E of the 1913 Rules.

Now Order XVI Rule 31E in the 1925 Annual Practice p. 265 reads as follows:—

> "When a person is applying or is admitted to take or defend or be a party to any legal proceedings as a poor person he shall not be liable for any Court fees, *nor, unless the Court or a Judge shall otherwise order, to pay costs to any other party, etc.*"

It should be noted that although the 1913 Rule was in England repealed by the 1926 Rules and Orders, the discretion to order a pauper to pay costs was preserved by the present Order XVI Rule 28(1). But there is no corresponding section in the Civil Procedure Code which gives any such discretion. Section 768 which, like Order XVI Rule 28 (1), refers to the question of Court fees, omits all mention of any discretion as regards the payment of costs and the English cases as to the exercise of a discretion in certain cases have no application in this Colony.

(*c*) The third supposed exception is that a pauper may be ordered to pay the costs up to date as a condition for an order for amendment of his pleadings. But that is quite a different matter. If he does not pay, he cannot amend, but that does not mean that he is ordered to pay if he does not amend.

On examination, therefore, the supposed exceptions to the general rule are really not exceptions at all, and I find that there is no jurisdiction to order a pauper to pay costs to an opposite party.

As regards the costs before the plaintiff gave notice of the order admitting him to sue as a pauper, there is no reason why he should not pay these costs (see *Prince Albert* v. *Strange*, 64 E.R. at p. 321), and I order accordingly that the costs up to April 9th, 1934, be taxed as between party and party and paid by the plaintiff to the defendants. The defendants are entitled to be indemnified out of the general estate of Ho Sok Choo Neo and their costs should be taxed as between solicitor and client with a certificate for two counsel.

Order refused.

Solicitor for the plaintiff—*C. H. Withers Payne.*

Solicitors for defendants—*Braddell Brothers.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

August 31, 1934.

V. KANTHAN.....Plaintiff

vs.

M. S. K. S. KANDASAMY CHETTY..Defendant

[PENANG IN FORMA PAUPERIS Suit No. 191 of 1933]

Limitation of suits—claim for wages—"tindal" whether a "labourer"—wages deposited with employer for accumulation—repayment on demand—starting point of period of limitation—Ordinance No. 56 (Limitation), Arts 2, 42, 84.

A "tindal" whose duties consist of supervising coolies, keeping a check roll, etc., is not a "labourer" within Article 2 of the Schedule to Ordinance No. 56 (Limitation) and a claim by him for wages falls within Article 84.

Where a servant enters into an agreement with his employer that his wages should be allowed to accumulate in his employer's hands, the servant drawing from time to time what he requires for expenses and a balance being struck when the servant leaves the employer's employment.

Held, that the money so left with the employer is "money deposited" within the meaning of Article 42 of Ordinance No. 56 (Limitation) and that time only begins to run from the date on which a demand for payment is made.